Filed 06/21/10 P. v. Sweigart CA1/4

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. DARRELL SWEIGART, Defendant and Appellant.	A118840 (San Francisco County Super. Ct. No. 193281)

A young woman was stabbed to death in 1976, and defendant Darrell Sweigart was the prime suspect. Defendant was not prosecuted for the crime until 2004, after further investigation using recently developed deoxyribonucleic acid (DNA) tests linked him with the victim. The DNA test results, along with other evidence, were used to convict defendant of second degree murder. Defendant claims he was denied due process by the delayed prosecution and wrongly convicted upon evidence that should have been excluded from trial. We reject defendant's claims and affirm the judgment.

I. FACTS

A. The crime and initial investigation in 1976

Wanda Baun was 19 years old when she was stabbed to death in an alley behind a San Francisco apartment building on Larkin Street in July 1976. She was last seen alive on the night of Friday July 2, and her body was discovered on Monday July 5. She was probably killed on July 4 or 5 because no residents of the building saw her body in the alley on July 2 or 3.

Baun was stabbed over 80 times in the chest and neck with a knife. The thrusts punctured her heart, lungs, jugular vein, and carotid artery. She was wearing a skirt, no underwear, the crotch of her pantyhose was torn, and she had been sodomized shortly before her death. Sodomy was established at the autopsy by the existence of sperm in the victim's rectum, and was estimated to have occurred within hours of the victim's death and no later than one day before her death. There was no sperm in the victim's vagina, and there was no evidence of trauma to her rectum or vagina. When Baun's body was discovered, she had no identification on her. Days earlier, she had been seen with a purse containing identification and personal papers. Baun had been working as a prostitute in the summer of 1976.

After discovery of Baun's body, the police interviewed the residents of the Larkin Street apartment building fronting on, and connecting to, the alley. The apartment building had a door in the lobby on the ground floor level that opened onto an exterior staircase that descended to the alley, where Baun's body was found. Defendant lived in the building on the ground floor. His apartment entrance was six feet or less from the doorway leading down to the alley. When interviewed by the police upon discovery of the body in the alley on Monday, July 5, 1976, defendant told the police he had been home over the weekend and heard nothing unusual.

On July 7, 1976, two days after Baun's body was discovered, a young prostitute named Deborah Campbell went to the police and told them she had been forcibly sodomized and robbed at knifepoint by defendant in his Larkin Street apartment about a month before Baun was killed in the alley of that apartment building. Campbell had two encounters with defendant. In the first encounter, Campbell met defendant on the street and they arranged "a date for money." They went to a cheap hotel. Defendant wanted to sodomize Campbell but she refused so they had penis-vagina intercourse. Two or three weeks later, defendant and Campbell met on the street again, talked about "having another date," and defendant asked her to come to his apartment. Campbell agreed. Campbell undressed and was standing by the bed when defendant grabbed her from behind and stuffed something in her mouth to gag her. Defendant then tied her hands behind her

back, shoved her down on the bed, and sodomized her while holding the blade of a switchblade knife to her throat. While sodomizing her, defendant called the frightened Campbell a whore and bitch and said, " 'I'm going to kill you.' " After sexually assaulting Campbell, defendant went through her purse as she lay tied up on the bed. Defendant then untied Campbell, apologized, and asked her if she "was going to go to the police or tell anyone." Campbell said "no." Campbell did not go to the police until about four weeks later, when she learned that a prostitute had been killed at the same address where she had been assaulted.

In early 1976, defendant was 22 years old and a convicted felon on parole, living with a male lover. Defendant was on parole for grand theft from a person. The police obtained a search warrant for defendant's apartment and conducted a search on July 9, 1976. The search revealed a four-inch folding pocket knife and Campbell's wallet. No evidence of Baun's blood was found in defendant's apartment.

Defendant was interviewed by the police at the Hall of Justice following the search of his apartment. Defendant told the police he was gay. In a recorded portion of the interview, the police asked defendant about Campbell, and he admitted having two sexual encounters with her, although initially denying the use of force. Defendant said, concerning the first encounter, that she sexually propositioned him on the street for money, and he accepted. The police asked defendant if he had "a normal sex act with her," and he said "yes." When asked "what did this consist of," defendant said: "Me fucking her." Defendant said, concerning the second encounter, that he saw her on the street and she propositioned him again. Defendant told her he did not have any money, and she agreed to come to his apartment anyway. At the apartment, defendant asked Campbell if he could do "the [S]odom trip," and she said "she wouldn't even do it for a million dollars." But, according to defendant, when he said "why don't you just try it," she said "okay." Defendant tied her hands behind her back with a robe belt, stuck his sock in her mouth, and sodomized her. Defendant said Campbell was a willing participant the entire time.

Defendant denied threatening Campbell with a knife. Defendant admitted carrying a folding knife with a four-inch blade and said Campbell saw the knife when it came out of his pocket while he was undressing for sex. But defendant told the police he never opened the knife or threatened her with it. In explaining why the police discovered Campbell's wallet in his apartment during the search, defendant said she took her wallet out of her purse when she came to his apartment for sex and accidentally left it on his dresser. Defendant claimed that he offered to return the wallet when he saw her on the street a couple weeks later, but she said she did not need it.

Defendant soon changed his description of the second encounter with Campbell and admitted using force. Defendant said that Campbell initially agreed to sodomy but protested when he started to tie her up. Defendant said he sat on her back, tied her hands behind her, stuck a sock in her mouth, held the blade of his folding knife to her throat, and sodomized her. He claimed he stopped when she started to cry, untied her, and apologized. According to defendant, Campbell accepted the apology, said "just don't do it again," told him she liked him, and agreed to go to dinner with him sometime.

The police also questioned defendant about the stabbing victim, Baun. That interview was not recorded. The investigating officer testified that, during the interview, he noticed a cut on defendant's thumb and asked him about it. Defendant said he cut his thumb over the weekend while washing a butcher knife at the sink when the doorbell rang, and the sound startled him. Defendant said nothing to incriminate himself. Defendant was never prosecuted in 1976 for Baun's killing, nor were criminal charges ever filed concerning the allegations made by Campbell. But Campbell's allegations were the basis for a petition to revoke defendant's parole. The petition was dismissed when Campbell failed to appear at the parole board hearing.

B. The Baun case is reopened in 2002

In 2002, Wanda Baun's father contacted the police about his daughter's unsolved murder, and the case was reopened for further investigation. The police located the microscope slides of biological material collected during Baun's 1976 autopsy, and a

criminalist conducted a DNA identity test on the sperm extracted from the murder victim's rectum. The sperm DNA taken from the victim matched defendant's DNA.

In 2003, a police officer contacted defendant to interview him.[1] A tape recording of the interview was played for the jury and a transcript of the recording is provided in the record on appeal. At the start of the interview, defendant denied knowing Baun in 1976. Defendant said the police interviewed him about the Baun killing in 1976 because "Debbie" Campbell implicated him out of revenge. In conflict with the story he told the police in 1976, defendant in 2003 told the police that he had consensual intercourse with Campbell a couple times (never for money), and she became angry when she learned he had a male lover so she went to the police with a false story. At the 2003 interview, the police told defendant that Campbell had said that defendant "threatened her with a knife and bound her hands and sodomized her," and defendant responded: "It's not true." In 1976, defendant had admitted forcibly binding and sodomizing Campbell at knifepoint. In 2003, defendant denied sodomizing Campbell (forcibly or otherwise) and said there was only one woman he "ever had sodomy with" and that was his wife in 1981. Defendant also said there were only three women he had sex with in the 1970s in San Francisco, and identified them. The murder victim Baun was not on that list.

The police told defendant: "Your sperm was in the dead girl's body." Defendant responded: "What? I never had sex with her. I didn't even know her. And I have an alibi for where I was that night." But defendant quickly retreated from this total denial when the police observed that "[t]here's a gal who's stabbed to death just adjacent to your apartment" with your sperm "inside her dead body." Defendant admitted: "I had to have [had] sex with her." While admitting that he must have had sex with her, defendant said he did not remember doing so, and he repeatedly denied killing her.

---

[1] At the time of his 2003 interview, defendant was serving a lengthy prison term for robbing and raping women at knifepoint in 1981. He was convicted of three counts of rape, five counts of robbery, six counts of assault with a deadly weapon, and other offenses. These criminal acts from 1981 were excluded from the trial and never revealed to the jury in this case. The information is included here to provide a complete record but is excluded from our consideration when evaluating the evidence on appeal.

C. Defendant is tried and convicted in 2007

Defendant was indicted for Baun's murder in 2004. Defense counsel moved to dismiss the case claiming a denial of due process and speedy trial rights by the delayed prosecution of defendant for a murder committed 28 years previously, after material evidence and witnesses were lost. (U.S. Const. 5th & 6th Amends; Cal. Const., art. 1, § 29.) The court denied the motion after holding an evidentiary hearing that lasted about ten days.

In other pretrial motions, defense counsel moved to exclude the autopsy report because the pathologist was dead, making it impossible for defendant to confront the pathologist as a witness in court with cross-examination. (U.S. Const. 6th Amend.; *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*).) The court denied the motion. Defense counsel also moved to exclude DNA test results claiming that the criminalist did not use correct scientific procedures. (*People v. Kelly* (1976) 17 Cal.3d 24, 31-32 (*Kelly*).) The court held an evidentiary hearing at which the criminalist testified for two days about the procedures he used to test DNA, and the court denied the motion.

Jury trial began on June 5, 2007. The prosecution presented its case, including the evidence summarized above: police testimony establishing that defendant lived in the building connected to the alley where the victim was killed; expert testimony identifying the sperm extracted from the victim's rectum as defendant's; Campbell's testimony describing defendant's sexual assault of her about a month before Baun was killed; and defendant's inconsistent statements to the police in 1976 and 2003.

The defense presented an expert witness who challenged the criminalist's findings concerning the DNA results. The defense also presented an expert on police interrogation methodology who opined that younger people are more impressionable when interrogated by the police and tend to confess more often than older people. The defense argued to the jury that Campbell lied about the 1976 sexual assault and suggested that defendant falsely confessed to forcibly sodomizing her because defendant was young and unsophisticated. The defense also called police officers and the chief medical examiner who had testified earlier, in place of the deceased pathologist who performed the autopsy, and questioned

the recordation, custody, preservation, and assessment of the physical evidence from 1976 to date. The defense argued to the jury that evidence was missing and mishandled, leading to a reasonable doubt about defendant's guilt.

The jury rejected the defense and returned a verdict on July 3, 2007, finding defendant guilty of second degree murder. (Pen. Code, § 187.) The court sentenced defendant to an indeterminate prison sentence of five years to life, the operative term for second degree murder in 1976. This appeal followed.

II. DISCUSSION

On appeal, defendant claims (1) he was denied due process by the 28-year delay in prosecution between the 1976 murder and the 2004 indictment, during which time material evidence and witnesses were lost; (2) Campbell's testimony about an uncharged sexual assault was wrongly admitted to show a common scheme to sodomize prostitutes; (3) the autopsy report was testimonial, and its admission violated defendant's constitutional right to confront witnesses against him because the pathologist who performed the autopsy was dead and cross-examination of the chief medical examiner about the autopsy report was insufficient; (4) the autopsy report lacked proper foundation to be admitted as an official record; (5) the rectal specimen slide was wrongly admitted because the prosecution did not establish an adequate chain of custody; (6) the prosecution's destruction of the biological material on the rectal slide during DNA testing violated defendant's right to due process and a fair trial; and (7) the DNA evidence should have been excluded because the crime lab failed to conduct the DNA analysis in a manner consistent with accepted scientific protocols. We address each of these claims in turn.

A. Delay in prosecution

Defendant claims he was denied due process by the 28-year delay in prosecution between the 1976 murder and the 2004 indictment, during which time material evidence and witnesses were lost. The People maintain that defendant was not materially prejudiced by the delay and that any prejudice defendant did suffer was justified by the need for further investigation using recently available DNA testing to link defendant with the victim.

1. General Principles

" '[T]he right of due process protects a criminal defendant's interest in fair adjudication by preventing unjustified delays that weaken the defense through the dimming of memories, the death or disappearance of witnesses, and the loss or destruction of material physical evidence.' [Citation.] Accordingly, '[d]elay in prosecution that occurs before the accused is arrested or the complaint is filed may constitute a denial of the right to a fair trial and to due process of law under the state and federal Constitutions. A defendant seeking to dismiss a charge on this ground must demonstrate prejudice arising from the delay. The prosecution may offer justification for the delay, and the court considering a motion to dismiss balances the harm to the defendant against the justification for the delay.' " (*People v. Nelson* (2008) 43 Cal.4th 1242, 1249-1250 (*Nelson*).)

" 'In the balancing process, the defendant has the initial burden of showing some prejudice before the prosecution is required to offer any reason for the delay.' " (*People v. Morris* (1988) 46 Cal.3d 1, 37, italics omitted, disapproved on another point in *In re Sassounian* (1995) 9 Cal.4th 535, 543, fn. 5.) Prejudice is never presumed, no matter how long the delay. (*Nelson, supra,* 43 Cal.4th at p. 1250.) "[T]he defendant must affirmatively show prejudice" (*ibid.*), which "may be shown by loss of material witnesses due to lapse of time [citation] or loss of evidence because of fading memory attributable to the delay." (*Morris, supra,* at p. 37.)

"The prejudice to defendant must be balanced against the justification for the delay. The state and federal constitutional standards regarding what justifies delay differ." (*Nelson, supra,* 43 Cal.4th at p. 1251.) The United States Constitution appears to require an intentional delay undertaken to gain a tactical advantage over defendant before a violation of due process will be declared. (*United States v. Gouveia* (1984) 467 U.S. 180, 192; *United States v. Marion* (1971) 404 U.S. 307, 324-326; see *Nelson, supra,* at pp. 1251-1254 [discussing federal standard].) However, the California Supreme Court has explained that "the exact standard under the [United States] Constitution is not entirely settled. It is clear, however, that the law under the California Constitution is at least as

favorable for the defendant in this regard as the law under the United States Constitution," and thus our high court evaluates justification for prosecutorial delay under state law. (*Nelson, supra,* at p. 1251.) We follow that approach here.

"[U]nder California law, negligent, as well as purposeful, delay in bringing charges may, when accompanied by a showing of prejudice, violate due process." (*Nelson, supra,* 43 Cal.4th at p. 1255.) "[W]hether the delay was negligent or purposeful is relevant to the balancing process. Purposeful delay to gain an advantage is totally unjustified, and a relatively weak showing of prejudice would suffice to tip the scales towards finding a due process violation. If the delay was merely negligent, a greater showing of prejudice would be required to establish a due process violation." (*Id.* at p. 1256.)

In *Nelson,* our Supreme Court found strong justification for delay where the police suspected defendant of killing a young woman in 1976 but did not charge him with murder until 2002, when scientific advances led to development of DNA testing that matched defendant with crime scene evidence. (*Nelson, supra,* 43 Cal.4th at p. 1256.) The defendant in *Nelson* showed prejudice from the delay in prosecution but the California Supreme Court found no due process violation after balancing the demonstrated prejudice against the justification for the delay. The high court adopted the findings of the court of appeal on this point: " '[T]he delay was not for the purpose of gaining an advantage over the defendant. [Citation.] Indeed, the record does not even establish prosecutorial negligence. The delay was the result of insufficient evidence to identify defendant as a suspect and the limits of forensic technology. [Citations.] When the forensic technology became available to identify defendant as a suspect and to establish his guilt, the prosecution proceeded with promptness. Without question, the justification for the delay outweighed defendant's showing of prejudice.' " (*Id.* at p. 1257.) The facts are similar here, and we reach a similar conclusion in rejecting defendant's claim that prosecutorial delay denied him due process.

2. Defendant's allegations of prejudice

The evidence produced at trial included the autopsy report, biological specimens collected during the autopsy, autopsy photographs, crime scene photographs, the victim's

clothing, audiotapes of police interviews of defendant concerning Campbell's allegations, and the testimony of a number of witnesses from the original investigation including the two investigating police officers, the crime scene technician, and the crime scene photographer. But the pathologist who performed the autopsy died before defendant's trial so the San Francisco Chief Medical Examiner testified in his place concerning the cause of death and evidence collected during the autopsy. Also, the prosecution was unable to locate certain reports and items from the 1976 investigation. Defendant claims he was prejudiced by the loss of evidence, specifically the loss of (1) fingerprints and blood samples collected at the scene of the crime and laboratory reports analyzing the evidence; (2) fingerprints and blood samples collected at defendant's apartment and laboratory reports analyzing the evidence; (3) items seized during the search of defendant's apartment; (4) police reports on the investigation; and (5) an audio recording of a police interview with defendant's male lover. Defendant also claims a loss of material witnesses, including the pathologist who performed the autopsy. We have reviewed the record in depth and conclude that defendant demonstrated prejudice sufficient to require the prosecution to justify the delay in filing charges, but the prejudice was minimal.

a. *Fingerprints and blood samples at the crime scene*

As for the alleged loss of fingerprints and blood samples collected at the crime scene, defendant cites the fact that the police were unable to locate any crime scene investigation or crime lab files for the Baun case. It is unclear on this record whether the crime scene investigation in 1976 actually included the collection and analysis of fingerprints and blood samples but it is a reasonable assumption. An investigating police officer in 1976, Inspector Michael Mullane, testified that it was likely that fingerprints and blood would have been collected and analyzed. The crime scene technician who responded to the Baun murder site testified that he would normally collect fingerprints and bodily fluids from crime scenes. Also, a former crime scene investigator testified for the defense that, in 1976, fingerprints and blood were routinely collected and analyzed in homicide cases.

But we fail to see how defendant was prejudiced by the apparent loss of fingerprints and blood samples taken from the crime scene. Prejudice might have arisen had it been suggested at trial that fingerprints and blood at the crime scene implicated defendant, and he needed the evidence to exonerate himself. No suggestion was ever made. In fact, Inspector Mullane testified that defendant would have been arrested in 1976 if any physical evidence placed defendant at the crime scene—and he was not arrested. The plain implication of Mullane's testimony is that defendant's fingerprints and blood were never found at the crime scene, and that testimony was presented to the jury. On appeal, defendant acknowledges this testimony but argues that "simply concluding that [the physical evidence] did not implicate [defendant] in the murder does not convey the full import of this missing evidence. This lost evidence could have implicated another in the murder." This is pure speculation.

There is no indication that any third party was implicated by any evidence collected at the crime scene. Inspector Mullane testified that defendant was the prime suspect and his written notes from the investigation do not show any " 'collateral investigations' " of others, as would be expected if evidence at the crime scene implicated a third party. To demonstrate a denial of due process, prosecutorial delay must result in actual, not speculative, prejudice. (*United States v. Marion, supra,* 404 U.S. at pp. 324-326.) "[T]he requisite prejudice resulting from the delay must be shown to be actual, specific, particularized, and nonspeculative." (*United States v. Moore* (D.C. Ohio, 1981) 515 F.Supp. 509, 510.) Defendant has failed to demonstrate actual prejudice from the apparent loss of fingerprints and blood samples collected at the crime scene.

b. *Fingerprints and trace blood samples from defendant's apartment*

Similarly, defendant has not shown any prejudice from the loss of fingerprints and blood samples collected at defendant's apartment. Inspector Mullane testified that defendant's apartment was tested for traces of blood and apparently dusted for fingerprints in an effort to find Baun's fingerprints in the apartment. The officer testified that defendant would have been arrested had blood or fingerprint evidence incriminated him, and defendant was not arrested. The prosecution even stipulated, in a statement read to

the jury, "that Ms. Baun's blood was not found in [defendant's] apartment in 1976, and there's no evidence of that ever being found in his apartment." Defendant claims that lost results from forensic tests conducted at his apartment prejudiced him because he did not have the opportunity "to present documentation from the police department itself" that Baun's blood was not found anywhere in his apartment. No prejudice is established given the unambiguous stipulation presented to the jury acknowledging precisely that fact.

c. *Items seized during the search of defendant's apartment*

The police seized a number of items from defendant's apartment on July 9, 1976, most of which were returned to defendant's lover and roommate several days later. Several items were presumably retained by the police (because there is no documentation noting their return) but these unaccounted for items could not be located for trial in 2007. Among the missing items is a knife. Defendant asserts that a blanket and bedcover taken from his apartment are also missing. Defendant claims on appeal that "had the bedclothes remained and charges [been] brought within a reasonable amount of time, they could have been tested for the presence of blood" from Campbell and (assuming a negative test) been used to impeach her accusation that defendant forcibly sodomized her in his apartment, causing her to bleed.

Defendant's claim of prejudice from the allegedly missing bedclothes is both speculative and overstated: speculative because defendant assumes that blood would not be found, and overstated because even a negative test result would be of marginal value. Defendant always admitted having sex with Campbell and, in 1976, admitted that the sex was forcible anal sex. Defendant's admission is powerful evidence of the truth of Campbell's accusation that would not be seriously undermined by the lack of corroborating physical evidence. Moreover, any test results showing an absence of Campbell's blood on the bed clothes would do little to disprove that she was forcibly sodomized given the commonsense recognition that she might not have bled heavily enough to leave a blood trace and any blood trace might have been washed away during the month that elapsed between the attack and the seizure of the bed clothes.

d. *Police reports*

The prosecution was unable to produce the 1976 police reports on the Baun murder investigation. The custodian of records for the San Francisco police department explained that the police had a policy of destroying police reports after ten years because there is not enough "room to keep all the reports." The police recently introduced a policy of electronically scanning reports before destruction of the paper records but no records exist in any format for police reports created prior to 1990.

On appeal, defendant claims that the loss of the Baun police report deprived him of the names of potential witnesses concerning the Baun murder, like the apartment building tenants, and the loss of other police reports from 1976 precluded defendant from investigating other crimes that may have shared characteristics with the Baun murder and thus implicated others in her killing. In fact, defendant poses a number of possible uses he could have made of 1976 police reports—most of which rest on the assumption that the reports contained an exhaustive amount of detailed information far beyond what is commonly memorialized in police reports.

We agree, however, that the destruction of the police reports is unfortunate, and created some prejudice. But the prejudice is not as great as defendant asserts. While the police reports no longer exist, other relevant materials remain and were provided to the defense. In addition to the materials noted above, like crime scene photographs, the defense was also provided with witness statements from the apartment building tenants, and handwritten notes of the investigating police officers that were used to refresh (and sometimes impeach) their recollection when testifying. Of course, had the police reports been preserved, the officers may have been able to recall more details about the investigation. The officers had little independent recollection of the Baun murder and relied heavily upon their notes to refresh their recollection. Nevertheless, there is no reason to think that the police reports would have aided defendant. On appeal, he suggests that "[t]here could have been valuable information collected that could have established Baun's connection to other people." The speculative nature of the suggestion is apparent, and the suggested possibility is undercut by the reality that police reports rarely include

exculpatory information. We therefore conclude that the loss of the police reports was prejudicial but not to the extent defendant claims.

e. *Audio recordings of police interviews with defendant and defendant's lover*

The police interviewed defendant on July 9, 1976, about Campbell's accusations and Baun's murder, and again on July 13, 1976, about the murder. The July 9 interview concerning Campbell was tape recorded, and that recording was played at trial. The July 9 and July 13 interviews concerning Baun were not recorded but the notes from the interviews were provided to the defense and were the subject of trial testimony. On appeal, defendant asserts that his lover at the time, Gary Cavelli, was interviewed by the police and complains that there are no notes or audio recordings of the interview. Defendant argues that the missing audiotapes of defendant's and Cavelli's interviews concerning the Baun murder deprived him of the opportunity to present evidence that his admission about forcibly sodomizing Campbell was coerced.

There are serious deficiencies in this argument. First, it is not established that the allegedly "missing" materials ever existed. Inspector Mullane testified that the July 9, 1976 interview of defendant concerning Baun's murder was *not* recorded, but instead "written down in longhand," and those notes were produced to the defense. Inspector Mullane did not independently recall the July 13, 1976 interview, and thus could not say whether it was recorded, but notes of the interview exist and were likewise produced to the defense. As for Cavelli, defendant provides no citation to the record to substantiate the claim that Cavelli was ever formally interviewed. Inspector Mullane, who interviewed defendant, testified that he never spoke to Cavelli and thus never generated any notes or tape recordings. Our own review of the record finds that the parties stipulated that Cavelli claimed he was "arrested" in connection with the Baun murder and that the police told him (falsely) that defendant admitted killing Baun and asked him if he believed it, to which he said no. Even if we assume the truth of Cavelli's assertion of police contact, the assertion does not prove that there was a formal interview that generated notes or an audio recording.

Second, and more fundamentally, defendant has failed to demonstrate any lost opportunity to present evidence of police coercion leading to his Campbell admission. The police interview concerning Campbell *was* recorded and that recording was played at trial. Any coercive tactics used to obtain the admission—and none appears—would have been obvious. The interviews concerning Baun did not produce any incriminating information or admissions, eliminating any need to show coercion. Defendant was not prejudiced by the alleged loss of police interview audiotapes.

f. *Deceased and unavailable lay witnesses*

Defendant claims that the delay in prosecution prejudiced him because various witnesses either died or became impossible to locate. We have fully reviewed defendant's claims and find no prejudice as to any of the lay witnesses. We address below defendant's claims as to two principal witnesses.

1. Gary Cavelli

Defendant claims that his lover Gary Cavelli, who died in 1988, might have been able to provide an alibi for defendant and had "critical impeachment evidence" about Campbell. No alibi was possible. The time of Baun's death was uncertain—she was last seen alive on Friday night, July 2, and discovered dead on the afternoon of July 5, 1976. The state of her body suggested that she had lain undiscovered for a while, because her spilled blood was crusted, but the existence of sperm in her rectum suggested that she probably died within one day of her discovery. The evidence thus left a rather wide window of time in which the killing could have occurred, making it highly unlikely that anyone could vouch for defendant's movements over the Fourth of July weekend. In any event, the entire matter of alibis is purely academic. Defendant did not deny having contact with Baun. In 2003, when confronted with the fact that a DNA test matched the sperm in Baun's rectum with him, defendant admitted that he must have had sex with her. Defendant thus admitted being with Baun during the relevant time period. Cavelli's alleged possession of impeachment evidence against Campbell is also irrelevant. It was stipulated that Cavelli previously said that Campbell had "turned in others on baseless charges," and thus Cavelli's denunciation of Campbell was introduced at trial without the

necessity of him testifying. In any event, Cavelli's impeachment of Campbell is no match for defendant's own 1976 admission that he forcibly sodomized her, just as she alleged.

3. "Tex"

Defendant asserts that he had an alibi witness, "Tex," who could vouch for his movements on Friday July 2, 1976, and the delay in prosecution prevented him from locating "Tex," and perhaps other alibi witnesses, for trial. The assertion is meritless. In 1976, defendant told the police that he was with a friend named "Tex" from around 5:00 p.m. to 8:30 p.m. on Friday, July 2. Baun was not killed during the time defendant said he was with Tex—she was still alive and seen at a restaurant around 8:30 or 9:00 p.m. on Friday night. In any event, as noted above, no alibi defense is possible given defendant's admission that he had sex with the victim shortly before she died. Defendant's admission, and the physical evidence, established that defendant was with Baun sometime over the Fourth of July weekend in which she was killed.

g. *Deceased pathologist and degraded biological specimen*

Defendant claims that the delay in prosecution also prejudiced him because the pathologist who performed the autopsy died before trial, and the biological specimen used for DNA testing degraded to the point where the test consumed the specimen and thus prevented further examination. We discuss these matters in detail below in connection with defendant's other claims on appeal. At this point, we acknowledge that defendant was potentially prejudiced by the pathologist's death and the consumption of the specimen and turn to a consideration of whether the justification for the delay outweighed defendant's showing of prejudice. (*Nelson, supra,* 43 Cal.4th at p. 1257.)

3. The delay was justified

As noted above, when assessing whether prosecutorial delay constitutes a deprivation of due process, "[t]he prejudice to defendant must be balanced against the justification for the delay." (*Nelson, supra,* 43 Cal.4th at p. 1251.) In *Nelson,* our high court found strong justification for delay on facts strikingly similar to the facts presented here. In *Nelson,* the police suspected defendant of killing a young women in 1976 but did not charge him with murder until scientific advances led to development of DNA testing

that matched defendant with crime scene evidence in 2002. (*Id.* at p. 1256.) The high court concluded: " '[T]he delay was not for the purpose of gaining an advantage over the defendant. [Citation.] Indeed, the record does not even establish prosecutorial negligence. The delay was the result of insufficient evidence to identify defendant as a suspect and the limits of forensic technology. [Citations.] When the forensic technology became available to identify defendant as a suspect and to establish his guilt, the prosecution proceeded with promptness. Without question, the justification for the delay outweighed defendant's showing of prejudice.' " (*Id.* at p. 1257.)

Defendant makes little effort to distinguish his case from *Nelson, supra,* 43 Cal.4th 1242. In his briefing on appeal, he barely mentions *Nelson*, pausing only to cite *Nelson* for the proposition that "[t]he existence of DNA technology is [a scientific] advance that would justify investigative delay." Defendant then proceeds to argue that scientific advances in DNA technology came in 1988, making it unreasonable for the prosecution to wait until 2002 to conduct DNA testing in the Baun case.

The exact year that DNA technology reached a level of sophistication necessary to analyze the biological sample at issue here is a matter of dispute. Defendant notes that DNA testing was admitted in a homicide case in 1988, and the admission approved in the first published case on the subject in 1991. (*People v. Axell* (1991) 235 Cal.App.3d 836.) From this, defendant argues that DNA testing was available in 1988 and recognized as admissible evidence in 1991, and thus the prosecution was negligent in waiting until 2002 to test the Baun autopsy sample. Defendant's argument disregards pertinent factual distinctions between *Axell* (where a fresh sample was tested) and this case (where an aged sample was tested). (*Id.* at pp. 842, 844.) The criminalist who tested the Baun autopsy sample testified that the DNA testing methods available in the late 1980s and early 1990s were inadequate to test the Baun sample given its aged, degraded state. The criminalist said testing methods sufficient to test the Baun sample were not developed until about 1996.

The question, then, is whether the six-year delay in prosecution between the availability of relevant DNA testing in 1996 and the performance of the test in 2002 was

justified. *Nelson* provides a clear answer on the subject, and the answer is affirmative. (*Nelson, supra,* 43 Cal.4th at pp. 1256-1257.) In *Nelson,* as here, the murder occurred in 1976, but DNA testing was not conducted until 2002. (*Id.* at p. 1247.) The court rejected the argument, repeated by defendant here, that the prosecution was negligent in failing to conduct the DNA comparison test sooner. The California Supreme Court stated: "Defendant argues that the DNA technology used here existed years before law enforcement agencies made the comparison in this case and that, therefore, the comparison could have, and should have, been made sooner than it actually was. Thus, he argues, the state's failure to make the comparison until 2002 was negligent. We disagree. A court may not find negligence by second-guessing how the state allocates its resources or how law enforcement agencies could have investigated a given case. . . . [T]he difficulty in allocating scarce prosecutorial resources (as opposed to clearly intentional or negligent conduct) [is] a valid justification for delay . . . .' [Citation.] It is not enough for a defendant to argue that if the prosecutorial agencies had made his or her case a higher priority or had done things a bit differently they would have solved the case sooner." (*Id.* at pp. 1256-1257.)

The same conclusion applies here. It is not true, as defendant asserts, that the "only possible explanation" for the delay in testing the Baun autopsy sample was "negligence." The explanation here is not negligence but scarce prosecutorial resources that make it impossible for law enforcement agencies to comb through, process, and conduct forensic tests on 30 years of unsolved murders as each new forensic capability is developed. The prosecutorial delay was fully justified here and outweighs defendant's showing of prejudice.

In closing, we note that the trial court here took special effort to minimize the prejudice defendant suffered. Upon defense counsel's request, the court administered an instruction to the jury, as follows: "The prosecution has the obligation to preserve all evidence, notes or reports obtained during the investigation of this case. Missing, lost or destroyed evidence, notes or reports cannot be used in any way to lighten the prosecution's burden of proving the defendant guilty beyond a reasonable doubt. [¶] In

determining what inferences to draw from the evidence in this case presented by the prosecution you may consider, among other things, the failure to explain or to deny by testimony missing, lost, destroyed or willfully suppressed evidence." Defendant was not denied due process.

B. Admission of uncharged sexual misconduct to prove a common plan

Evidence of a person's character, including evidence of character in the form of specific instances of uncharged misconduct, is inadmissible to prove that defendant had the disposition to commit the charged offense. (Evid. Code, § 1101, subd. (a); *People v. Falsetta* (1999) 21 Cal.4th 903, 910-911.) Such evidence may be admitted when relevant to prove some fact (such as motive, intent, plan, or identity) other than the defendant's disposition. (Evid. Code, § 1101, subd. (b).) The presence of a plan to do a given act has probative value to show that the act was in fact done. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 393 (*Ewoldt*).)

Here, Campbell's testimony that defendant forcibly sodomized her at knifepoint weeks before Baun was sodomized and stabbed to death was introduced to prove the existence of a common plan to sodomize prostitutes with force when necessary to compel compliance. The trial court found the similarity in the circumstances of the attack on Campbell and the circumstances of Baun's murder to be sufficient to support an inference that defendant killed Baun pursuant to the same design or plan defendant used to commit the sexual assault of Campbell. On appeal, the trial court's determination, "being essentially a determination of relevance, is reviewed for abuse of discretion." (*People v. Carter* (2005) 36 Cal.4th 1114, 1147.) The court did not abuse its discretion here.

1. Campbell's testimony was relevant to proving a common plan

"To establish the existence of a common design or plan, the common features must indicate the existence of a plan rather than a series of similar spontaneous acts, but the plan thus revealed need not be distinctive or unusual." (*Ewoldt, supra,* 7 Cal.4th at p. 403.) "[E]vidence that the defendant has committed uncharged criminal acts that are similar to the charged offense may be relevant if these acts demonstrate circumstantially that the defendant committed the charged offense pursuant to the same design or plan he

or she used in committing the uncharged acts. Unlike evidence of uncharged acts used to prove identity, the plan need not be unusual or distinctive; it need only exist to support the inference that the defendant employed that plan in committing the charged offense." (*Ibid.*) " '[A] common scheme or plan focuses on the manner in which the prior misconduct and the current crimes were committed, i.e., whether the defendant committed similar distinctive acts of misconduct against similar victims under similar circumstances.' " (*People v. Walker* (2006) 139 Cal.App.4th 782, 803.)

Campbell's testimony was properly admitted to prove a common plan given the distinctive acts of misconduct (knife use) against similar victims (young female prostitutes) under similar circumstances (anal sex, same address, events close in time). On appeal, defendant does not deny these similarities but argues that "[a]dmitting this evidence to show design was improper, as it was beyond dispute that the act—Ms. Baun's murder—took place." "In such a case," defendant argues, "when the charged act is beyond dispute, *Ewoldt*[, *supra*, 7 Cal.4th 380] requires that other crimes evidence to show common scheme or plan be excluded. [¶] Because the primary issue to be determined at trial was whether [defendant] was the perpetrator of Ms. Baun's murder, the evidence that the defendant committed uncharged offenses that were sufficiently similar to the charged offense to demonstrate a common design or plan, but not sufficiently distinctive to establish identity was not admissible."

Defendant misapplies *Ewoldt, supra,* 7 Cal.4th 380. He relies upon the following statement: "[E]vidence of a common design or plan is admissible only to establish that the defendant engaged in the conduct alleged to constitute the charged offense, not to prove other matters, such as the defendant's intent or identity as to the charged offense. [Citation.] [¶] For example, in most prosecutions for crimes such as burglary and robbery, it is beyond dispute that the charged offense was committed by someone; the primary issue to be determined is whether the defendant was the perpetrator of that crime. Thus, in such circumstances, evidence that the defendant committed uncharged offenses that were sufficiently similar to the charged offense to demonstrate a common design or plan (but not sufficiently distinctive to establish identity) ordinarily would be inadmissible.

Although such evidence is relevant to demonstrate that, assuming the defendant was present at the scene of the crime, the defendant engaged in the conduct alleged to constitute the charged offense, if it is beyond dispute that the alleged crime occurred, such evidence would be merely cumulative and the prejudicial effect of the evidence of uncharged acts would outweigh its probative value." (*Id.* at p. 406.)

While it was beyond dispute here that someone stabbed Baun to death, the exact nature of the killing (and whether it was first or second degree murder) was disputed and thus common plan evidence was highly probative. As noted above, the presence of a plan to do a given act has probative value to show that the act was in fact done. (*Ewoldt, supra,* 7 Cal.4th at p. 393.) The *act* at issue in a murder prosecution is not simply the killing, as defendant suggests, but the manner of the killing. *Ewoldt* explains this point well in its discussion of homicide cases in which evidence of uncharged similar misconduct was found properly admitted to establish a common design or plan. (*Id.* at pp. 394-396.) In one of those cases, defendant took over control of the home of her missing landlady who was soon found buried in the backyard with a bullet in her neck. (*Id.* at p. 395, citing *People v. Peete* (1946) 28 Cal.2d 306.) The court permitted introduction of evidence that defendant's prior landlord had suffered a similar fate as proof of a common plan " 'to acquire the property of a suitable victim by murder.' " (*Ewoldt, supra,* at p. 396.) In that case, as here, it was beyond dispute that the act—the victim's murder—took place. Nevertheless, evidence of a common plan was properly admitted "to establish that the defendant engaged in the *conduct* alleged to constitute the charged offense." (*Id.* at p. 406, italics added.) The conduct constituting the charged offense is not the bare act of killing, but the manner of killing and surrounding circumstances. Here, evidence that defendant had forcibly sodomized a young female prostitute at knifepoint while threatening to kill her was sufficiently similar to the charged offense (a recently sodomized young female prostitute stabbed to death) to be admissible as circumstantial proof that defendant murdered Baun pursuant to the same plan he used to commit the sexual assault of Campbell.

2. The evidence of prior misconduct was not unduly prejudicial

Defendant argues that Campbell's testimony, even if relevant to prove a common plan, should have been excluded because the probative value of the evidence was substantially outweighed by the probability of undue prejudice. (Evid. Code, § 352.) We recognize that evidence of prior acts of misconduct can be highly prejudicial and its admission requires careful analysis to avoid injustice. (*Ewoldt, supra,* 7 Cal.4th at p. 404.) The analysis considers three factors: (1) "the tendency of [prior misconduct] evidence to demonstrate the existence of a common design or plan"; (2) "the extent to which its source is independent of the evidence of the charged offense"; and (3) whether the prior misconduct resulted in a criminal conviction. (*Id.* at pp. 404-405.)

The "principal factor affecting the probative value of the evidence of defendant's uncharged offenses" is the first listed factor—"the tendency of that evidence to demonstrate the existence of a common design or plan." (*Ewoldt, supra,* 7 Cal.4th at p. 404.) Here, that tendency is strong. Defendant's uncharged misconduct with Campbell shared many distinctive features with the circumstances surrounding Baun's killing, and the charged and uncharged acts together suggested a planned course of action rather than a series of spontaneous events. Defendant notes certain differences between the sexual assault and murder, particularly the fact that defendant released Campbell with an apology while Baun was killed. But complete identity between incidents is not required, and one victim's survival does not, standing alone, negate the similarity of incidents tending to show the existence of a common plan. (*People v. Walker, supra,* 139 Cal.App.4th at p. 805.)

The probative value of prior misconduct also is affected by the second factor listed above—"the extent to which its source is independent of the evidence of the charged offense. For example, if a witness to the uncharged offense provided a detailed report of that incident without being aware of the circumstances of the charged offense, the risk that the witness's account may have been influenced by knowledge of the charged offense would be eliminated and the probative value of the evidence would be enhanced." (*Ewoldt, supra,* 7 Cal.4th at p. 404.) Campbell's testimony is not wholly independent of

the evidence of the charged offense because Campbell did not go to the police until after she heard from other prostitutes about Baun's killing. Nevertheless, her account of the incident included details unlikely to have been influenced by knowledge of the charged offense and, importantly, was corroborated by defendant's own admission.

On appeal, defendant argues that Campbell "may have worked as a police informant during this time" and thus was not an independent witness. The evidence as to Campbell's status as a police informant is in conflict. Campbell conceded that she, sometime *after* the Baun killing, helped the police with a single controlled drug buy but insisted that she was not a police informant in 1976 and that she unilaterally went to the police with her account of defendant's assault because she heard about Baun's murder and thought: "it almost happened to me." An investigator for the defense testified that Campbell was interviewed before trial and admitted to the investigator that she had also been a police informant sometime before meeting defendant. At trial, Campbell denied the investigator's account of the interview. Despite some conflict in the evidence, it is undisputed that Campbell's role as a police informant, whether before or after the 1976 Baun investigation, was a limited one. She was not a paid informant. She assisted the police on one or more specific occasions in exchange for leniency on charges pending against her. There is no evidence that Campbell's accusation against defendant was motivated by any offer of leniency. The evidence on this point is clear: Campbell unilaterally approached the police with her claim of sexual assault. Campbell's testimony was sufficiently independent to be probative.

However, the third factor listed above—whether the prior misconduct resulted in a criminal conviction—weighs against admission of Campbell's testimony. Defendant was never convicted of a sexual assault of Campbell. "This circumstance increased the danger that the jury might have been inclined to punish defendant for the uncharged offense[], regardless whether it considered him guilty of the charged offense[], and increased the likelihood of 'confusing the issues' (Evid. Code, § 352), because the jury had to determine whether the uncharged offense[] had occurred." (*Ewoldt, supra*, 7 Cal.4th at p. 405.)

We regard the potential for undue prejudice to be minimal here. The risk that a jury will punish a defendant for an uncharged offense even if it thinks him innocent of the charged offense is low where the testimony describing defendant's uncharged acts is "no stronger and no more inflammatory than the testimony concerning the charged offenses." (*Ewoldt, supra,* 7 Cal.4th at p. 405.) While Campbell's testimony was powerful, it was no more inflammatory than the evidence concerning Baun—a young women stabbed over 80 times and left to bleed to death in an alley. There is also little likelihood of confusing the issues because the jury's task of determining whether the uncharged offense had occurred was lightened by defendant's 1976 admission that the offense did occur as Campbell reported. The jury did not have to evaluate the veracity of Campbell's testimony on its own but could consider defendant's 1976 admission and subsequent denial decades later.

Considering all the circumstances, we conclude that the trial court did not abuse its discretion in admitting the evidence of defendant's uncharged misconduct as attested to by Campbell. We note, also, that the jury was cautioned to consider Campbell's testimony for "the limited purpose of deciding whether or not the defendant had a plan or scheme to commit the offense alleged in this case," and not "for any other purpose." Admission of the evidence for that limited purpose was proper.

C. Admission of autopsy report and testimony concerning the autopsy

An autopsy was performed on the day Baun's body was discovered, July 5, 1976. The autopsy was performed by Norville Sisson, M.D., an experienced forensic pathologist and autopsy surgeon who was, at the time, the San Francisco assistant medical examiner. Dr. Sisson prepared a necropsy report that described the condition of the body, diagnosed the cause of death, and documented the collection of specimens taken from the body for further examination. The collected specimens included various organs, a blood sample, and swabbed material from body surfaces smeared onto microscope slides, referred to in the necropsy report as "oral-rectal-vaginal smears." Dr. Sisson also prepared a separate microscopic description of the collected specimens in which he concluded that the "oral-vaginal and cervical smears are negative for spermatozoa" but the "rectal smears reveal

the presence of many spermatozoa." (Capitalization altered.) The rectal smear was stored until 2003, when the spermatozoa DNA was tested and found to match defendant's DNA.

Dr. Sisson died sometime before trial. The prosecution presented the necropsy report, microscopic description, coroner's register, blood typing report, and toxicology report as a single document (autopsy report) and offered it into evidence as an official record. (Evid. Code, § 1280.) The defense objected that the autopsy report does not meet the foundational requirements for an official record (Evid. Code, § 1280, subds. (b), (c)) and is a testimonial document barred by the Confrontation Clause (U.S. Const. 6th Amend.; *Crawford, supra,* 541 U.S. at p. 68). The trial court overruled the objections and admitted the autopsy report into evidence. The trial court also permitted Amy Hart, M.D., the current Chief Medical Examiner of San Francisco, to testify about the report and findings of Dr. Sisson. Defendant renews his objections to the autopsy report and Dr. Hart's testimony on appeal.

1. The autopsy report was admissible under the official record exception to the hearsay rule

" 'Hearsay evidence' is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a).) Hearsay is generally inadmissible but there are numerous exceptions. (Evid. Code, § 1200. subd. (b); see *id.* §§ 1220-1380.) One of those exceptions applies to official records and other official writings. (Evid. Code, § 1280.) "Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered in any civil or criminal proceeding to prove the act, condition, or event if all of the following applies: [¶] (a) The writing was made by and within the scope of duty of a public employee. [¶] (b) The writing was made at or near the time of the act, condition, or event. [¶] (c) The sources of information and method and time of preparation were such as to indicate its trustworthiness." (Evid. Code, § 1280.)

It is undisputed that Dr. Sisson's autopsy report satisfies the first foundational requirement of an official record: "The writing was made by and within the scope of duty

of a public employee." (Evid. Code, § 1280, subd. (a).) Dr. Sisson was a public employee (assistant medical examiner in the coroner's office), and the autopsy was performed within the scope of a coroner's statutory duty to "determine the circumstances, manner, and cause of all violent, sudden, or unusual deaths," deaths from "known or suspected homicide," and "deaths due to . . . stabbing." (Gov. Code, § 27491.) The coroner is required to maintain autopsy reports. (*People v. Williams* (1959) 174 Cal.App.2d 364, 390-391; see also Gov. Code, § 27463 [coroner's register].) It has long been recognized that an autopsy report is a public record. (*Williams, supra,* at pp. 390-391; accord *Dixon v. Superior Court* (2009) 170 Cal.App.4th 1271, 1278.) The California Supreme Court has approved admission of autopsy reports and their contents under the official and business records exceptions to the hearsay rule. (*People v. Beeler* (1995) 9 Cal.4th 953, 978-980 [report admitted as business record]; *People v. Clark* (1992) 3 Cal.4th 41, 158-159 [contents admitted as official record].)

Defendant does not deny that a properly prepared autopsy report is an official record but argues that Dr. Sisson's report was not properly prepared. We disagree. As noted above, an official record must be "made at or near the time of the act, condition, or event" described in the record and "[t]he sources of information and method and time of preparation were such as to indicate its trustworthiness." (Evid. Code, § 1280, subd. (b), (c).) Dr. Hart was the custodian of the Baun autopsy report, and she explained how autopsy reports are prepared and maintained in her office. David LeNoue, a junior investigator in the coroner's office in 1976, also testified. LeNoue said Dr. Sisson prepared autopsy reports by tape recording his findings while conducting an autopsy. The recording would then be transcribed, and Dr. Sisson would review and sign the autopsy report. We have reviewed the report itself and it appears to be a standard autopsy report. As Dr. Hart testified, the report is properly structured and contains information that one would expect to find in an autopsy report.

Defendant's dispute with the trustworthiness of the autopsy report rests on minutiae. For example, defendant complains that Dr. Sisson signed only the last page of multiple page documents instead of every page, and wrote the date on the necropsy

summation but not on his reported microscopic examination of biological specimens taken from the necropsy. Defendant also notes an inconsistency between the necropsy report that refers to "oral-rectal-vaginal smears" and the microscopic description report that adds the term cervical in referring to the smears as "oral-vaginal and cervical smears" and "rectal smears." These minor points do not diminish the trustworthiness of the autopsy report. A trial court has " 'wide discretion in determining whether sufficient foundation is laid to qualify evidence as a business record. On appeal, exercise of that discretion can be overturned only upon a clear showing of abuse.' " (*People v. Beeler, supra,* 9 Cal.4th at pp. 978-979.) No abuse of discretion appears here.

2. The autopsy report was arguably not a testimonial document barred by the Confrontation Clause but, in any event, its admission was not prejudicial

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." (U.S. Const., 6th Amend.) For many years, the United States Supreme Court held that the Sixth Amendment's Confrontation Clause permitted admission of statements of witnesses unavailable for trial provided that the statements had adequate indicia of reliability by falling within a firmly rooted hearsay exception or showing particularized guarantees of trustworthiness. (*Ohio v. Roberts* (1980) 448 U.S. 56, 66 (*Roberts*).) In 2004, the high court reconsidered and rejected *Roberts* in favor of a rule barring "testimonial" statements of witnesses unless the witness is unavailable and the defendant had a prior opportunity for cross-examination. (*Crawford, supra,* 541 U.S. at p. 68.) Testimonial statements include "prior testimony at a preliminary hearing, before a grand jury, or at a former trial," but the *Crawford* court left "for another day any effort to spell out a comprehensive definition of 'testimonial.' " (*Ibid.*) The meaning of "testimonial," and thus the reach of the Sixth Amendment's Confrontation Clause, remains in flux. Defendant argues that autopsy reports are testimonial documents barred by the Confrontation Clause.

Under the prior *Roberts, supra,* 448 U.S. 56 standard, the California Supreme Court held that admission of autopsy reports does not violate a defendant's constitutional right to confront witnesses because the reports are official records and business records,

and thus within firmly rooted exceptions to the hearsay rule. (*People v. Clark, supra,* 3 Cal.4th at p. 159; accord *People v. Beeler, supra,* 9 Cal.4th at pp. 978-980.) These cases are of limited use given the United States Supreme Court's recent abandonment of the *Roberts* standard. However, our high court has reviewed the admission of other forensic evidence under the current *Crawford, supra,* 541 U.S. 36 standard, and upheld admission of the contents of a DNA laboratory report. (*People v. Geier* (2007) 41 Cal.4th 555, 594-608 (*Geier*).)

In *Geier*, a laboratory director testified that DNA extracted from the victim's body matched defendant's DNA. (*Geier, supra,* 41 Cal.4th at p. 594.) The director supervised the analyst who conducted the DNA test, and relied upon the analyst's DNA report when testifying. (*Id.* at pp. 594-596.) The California Supreme Court held that the DNA report was not testimonial. (*Id.* at p. 608.) The court noted that forensic evidence, such as a laboratory report, "represents the contemporaneous recordation of observable events" made " 'during a routine, non-adversarial process meant to ensure accurate analysis.' " (*Id.* at p. 607.) "Records of laboratory protocols followed and the resulting raw data are not accusatory." (*Ibid.*) The *Geier* court indicated that an autopsy report, as another form of forensic evidence, is likewise not testimonial. (See *id.* at pp. 602-603, citing with approval cases holding that autopsy reports are not testimonial.)

But defendant challenges the continued vitality of *Geier* in light of a recent United States Supreme Court case holding inadmissible affidavits reporting the results of forensic analysis showing that material seized from the defendant was cocaine. (*Melendez-Diaz v. Massachusetts* (2009) ___ U.S. ___, 129 S.Ct. 2527 (*Melendez-Diaz*).) In reaching its decision, the court rejected arguments claiming that the affidavits were outside the reach of the Confrontation Clause because they rested upon neutral scientific observations that were not accusatory. (*Id.* at pp. 2533-2536.) Four dissenting justices accepted the argument and asserted that "[l]aboratory analysts who conduct routine scientific tests are not the kind of conventional witnesses to whom the Confrontation Clause refers." (*Id.* at p. 2558 (dis. opn. of Kennedy, J., joined by Roberts, C.J., Breyer, J., and Alito, J.).) But a majority of the justices held that "[t]he Sixth Amendment does not permit the prosecution

to prove its case via *ex parte* out-of-court affidavits," regardless of the claimed impartiality and reliability of the information underlying the affidavits. (*Id.* at p. 2542.) It is important to note that the form of the forensic evidence (a sworn affidavit) appears critical to the court's decision in *Melendez-Diaz*. The decision commanded a bare majority with Justice Thomas writing a concurring opinion emphasizing his position that " 'the Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.' " (*Id.* at p. 2543 (conc. opn. of Thomas, J.).) It thus remains an open question as to whether forensic evidence in the form of laboratory reports and autopsy reports, which do not appear to be "formalized testimonial materials," are barred by the Confrontation Clause.

The uncertainty created by *Melendez-Diaz, supra*, 129 S.Ct. 2527 has fueled a legal firestorm. In California, the intermediate appellate courts have grappled with *Melendez-Diaz*'s impact upon *Geier* concerning the admissibility of forensic evidence and reached conflicting opinions that are now under review by our Supreme Court. (*People v. Rutterschmidt* (2009) 176 Cal.App.4th 1047, review granted Dec. 2, 2009, S176213 [testimony of supervising criminalist as to result of drug tests and report prepared by another criminalist held admissible]; *People v. Dungo* (2009) 176 Cal.App.4th 1388, review granted Dec. 2, 2009, S176886 [testimony of one pathologist as to manner and cause of death in murder case based upon autopsy report prepared by another pathologist held inadmissible]; *People v. Lopez* (2009) 177 Cal.App.4th 202, review granted Dec. 2, 2009, S177046 [blood-alcohol level test report prepared by a criminalist who did not testify at trial held inadmissible]; *People v. Gutierrez* (2009) 177 Cal.App.4th 654, review granted Dec. 2, 2009, S176620 [testimony by one nurse practitioner as to the results of sexual assault examination and report prepared by another nurse practitioner held admissible except for victim's narrative, and testimony by supervising criminalist as to the result of DNA tests and report prepared by another criminalist held admissible].)

Ultimately, the California and United States Supreme Courts will resolve the issue of the admissibility of autopsy reports prepared by a pathologist who does not testify at

trial. We need not express an opinion on the matter because any error in admitting the autopsy report here was harmless. Confrontation Clause violations are subject to federal harmless error analysis. (*Melendez-Diaz, supra,* 129 S.Ct. at p. 2542, fn. 14; *Geier, supra,* 41 Cal.4th at p. 608.) " '[A]n otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt.' [Citation.] The harmless error inquiry asks: 'Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?' " (*Geier, supra,* 41 Cal.4th at p. 608.) A number of courts have found admission of autopsy reports in violation of the Confrontation Clause to be harmless error. (E.g., *Mungo v. United States* (D.C. Cir., 2010) 987 A.2d 1145, 1154-1155; *Commonwealth v. Avila* (Mass. 2009) 912 N.E.2d 1014, 1029-1030; *State v. Lockyear* (N.C. 2009) 681 S.E.2d 293, 304-305; *Martinez v. State of Texas* (Tex. Ct. App., Mar. 24, 2010 No. 07-08-00523-CR) ___ S.W.3d ___, 2010 WL 1067560; *Wood v. State of Texas* (Tex. Ct. App. 2009) 299 S.W.3d 200, 214-216.) We reach the same conclusion here.

As the People ably demonstrate on appeal, the autopsy report was cumulative of properly admitted evidence at trial. The cause and manner of death were established by Inspector Mullane's testimony that Baun had multiple stab wounds to her upper body; crime scene and autopsy photographs showing the stab wounds; and Dr. Hart's opinion testimony (based on her review of the autopsy photographs) that Baun died from multiple stab wounds. At trial, defense counsel conceded that "[t]he cause of death is not really at issue," and focused his attention upon the reported condition of the body—especially the autopsy report's conclusions about the presence of spermatozoa. The defense renews that emphasis on appeal.

Dr. Sisson's microscopic description of biological specimens from the autopsy reported: "oral-vaginal and cervical smears are negative for spermatozoa" and "rectal smears reveal the presence of many spermatozoa." (Capitalization altered.) The spermatozoa was later matched with defendant. Defendant argues that Dr. Sisson's report was used to establish that the victim Baun had been sodomized by defendant shortly

before she was killed and, together with Campbell's testimony of defendant's forcible sodomy of her an knifepoint, convicted him of Baun's murder.

But Dr. Sisson's autopsy report about the presence of spermatozoa was cumulative of other evidence at trial. Dr. Sisson was not alone in observing the presence of spermatozoa on the rectal slide, and its absence from the other slides. Dr. Hart testified at trial that she personally examined the vaginal slide and saw no spermatozoa. The criminalist who performed the DNA test, Matthew Gabriel, testified that he examined the rectal slide and found sperm cells present.

Defendant does not deny the existence of this independent evidence of the presence of spermatozoa but argues that he was prejudiced by the inability to cross-examine Dr. Sisson on the *exact* collection point for the rectal smear—whether deep in the rectum or on the surface of the anus. Defendant maintains that the distinction matters, because if sperm was found on the anus surface then the sperm arguably could have leaked from the vagina and be indicative of vaginal sex, instead of anal sex. Defendant thinks his defense would be stronger if the forensic evidence could be interpreted to show vaginal rather than anal sex because it would diminish the similarities between his forcible sodomy of Campbell and sex with the murder victim Baun, and would increase the period of time that elapsed between his sex act with Baun and her death (sperm may subsist longer in the vagina than the rectum).

Defendant seems to have lost sight of the Confrontation Clause violation at issue here. The violation, if any, was in admitting Dr. Sisson's statement in the autopsy report that "oral-vaginal and cervical smears are negative for spermatozoa" and "rectal smears reveal the presence of many spermatozoa." (Capitalization altered.) The admission of the statement was harmless because other witnesses who appeared at trial and were subjected to cross-examination independently reported the same information from their personal observation of the smears. Any vagueness in Dr. Sisson's written statement was not a Confrontation Clause violation but an imperfection that could be, and was, exploited by the defense whether or not Dr. Sisson testified. His absence from trial made it easier for the defense to criticize the alleged lack of specificity in naming the biological specimen

collection points. While appellate counsel for defendant claims prejudice from admission of the autopsy report, the record shows that defense counsel at trial made more use of the autopsy report than did the prosecution. The defense used the lack of specification of collection points, and other aspects of the autopsy report, to argue as defendant does on appeal—that the evidence was inconclusive on whether anal or vaginal sex occurred, and whether the sex was forcible given Dr. Sisson's observation that there was no trauma to either the vagina or anus.

In any event, defendant is mistaken in suggesting that the case turned upon whether he had vaginal or anal sex with the victim. The evidence—independent of the challenged autopsy report—plainly showed that the victim Baun (a young female prostitute) was killed outside defendant's apartment building, defendant had sex with Baun, defendant lied to the police in saying he did not have sex with Baun, and defendant raped a young female prostitute at knifepoint days before Baun was stabbed to death. Any constitutional error in admitting the autopsy report was harmless beyond a reasonable doubt.

D. The chain of custody for the microscope slide of biological material collected during the autopsy was properly documented and the slide properly admitted in evidence

Defendant contends that the rectal slide should not have been admitted in evidence because there was insufficient evidence of the chain of custody to establish that the slide was what it purported to be. As the People point out on appeal, defendant failed to object on this ground below. Defendant concedes as much in his reply brief but argues that the failure to object constitutes ineffective assistance of counsel.

"In order to establish a claim of ineffective assistance of counsel, defendant bears the burden of demonstrating, first, that counsel's performance was deficient because it 'fell below an objective standard of reasonableness [¶] . . . under prevailing professional norms.' [Citations.] . . . If a defendant meets the burden of establishing that counsel's performance was deficient, he or she also must show that counsel's deficiencies resulted in prejudice, that is, a 'reasonable probability that, but for counsel's unprofessional errors,

the result of the proceeding would have been different.' " (*People v. Ledesma* (2006) 39 Cal.4th 641, 745-746.)

Defense counsel's performance was not deficient. An adequate chain of custody was established for admission of the rectal slide, and thus any objection would have been futile. "In a chain of custody claim, ' "[t]he burden on the party offering the evidence is to show to the satisfaction of the trial court that, taking all the circumstances into account including the ease or difficulty with which the particular evidence could have been altered, it is reasonably certain that there was no alteration. [¶] The requirement of reasonable certainty is not met when some vital link in the chain of possession is not accounted for, because then it is as likely as not that the evidence analyzed was not the evidence originally received. Left to such speculation the court must exclude the evidence. [Citations.] Conversely, when it is the barest speculation that there was tampering, it is proper to admit the evidence and let what doubt remains go to its weight." [Citations.]' (*People v. Diaz* [(1992)] 3 Cal.4th [495] at p. 559; see also Méndez, Cal. Evidence (1993) § 13.05, p. 237 ['While a perfect chain of custody is desirable, gaps will not result in the exclusion of the evidence, so long as the links offered connect the evidence with the case and raise no serious questions of tampering'].) The trial court's exercise of discretion in admitting the evidence is reviewed on appeal for abuse of discretion. (*County of Sonoma v. Grant W.* (1986) 187 Cal.App.3d 1439, 1448.)" (*People v. Catlin* (2001) 26 Cal.4th 81, 134.)

The prosecution established an adequate chain of custody. Dr. Hart testified that microscope slides of biological specimens are routinely prepared during an autopsy. The slides are collected in the autopsy surgical area, the slides are recorded in the autopsy report, the slides are labeled by the pathologist with a unique number assigned to each autopsy, and the slides are then carried across the hall to the pathology department for storage. The slides are maintained in chronological order by year and autopsy report number, first in the pathology department and later in a locked storage area in the basement of the medical examiner's office.

Winefredo Mendoza of the medical examiner's office testified that he located a rectal slide from the Baun autopsy in the basement storage area and delivered the slide to Inspector Michael Maloney in 2003. Mendoza saw the Baun case number and the word rectum written on a label adhered to the slide. Inspector Maloney's chronological report of the investigation shows that, on January 9, 2003, he picked up "sperm evidence from the rectal swab in 1976" from Mendoza in the medical examiner's office, and delivered it to the police department property room.

Matthew Gabriel, a criminalist, testified that he picked up the Baun slide from the police department property room on June 30, 2003. The slide was in a sealed envelope and Gabriel signed his initials on the envelope upon receipt. The slide had a coroner's office sticker on it with a case number and the letter "R" etched into the glass. Gabriel examined the slide under a microscope and saw skin and tissue-like material and sperm cells. The observation indicated to Gabriel that he had a potential mixed sample of the victim's tissue and sperm cells from a male perpetrator. The criminalist extracted DNA from the sperm cells, tested it, and positively matched the sperm cell DNA with defendant.

Defendant asserts that there are gaps in this chain of custody because the rectal slide "was not accounted for during three distinct periods of time": (1) its transfer from the autopsy theater to the pathology department in July 1976; (2) its storage at the medical examiner's office from 1976 to 2003; and (3) its storage in the police department property room from the time the slide was delivered to the room on January 9, 2003, until it was officially logged into the computer inventory two days later. There are no gaps.

Dr. Sisson died before trial and thus could not testify that he physically transferred the slide from the autopsy theater to the pathology department in 1976. But Dr. Hart testified that slides are routinely transferred by pathologists between the two locations, the records show preparation of a slide, and the slide (with the unique case number assigned to the Baun autopsy) was located in the medical examiner's office when the police requested it.

It is also immaterial that the slide was not observed from 1976 until 2003, when it was retrieved from storage. Defendant notes that the medical examiner's staff prepared a computer inventory of their stored materials in 1997, and failed to list "rectal" in describing the Baun slides. Defendant also notes that a police officer said it took the medical examiner's staff time to locate the slide in 2003. The rectal slide may have been overlooked during the 1997 inventory, or its specific description not recorded, and staff may have needed time to locate a slide that had been stored for almost thirty years—these facts do not show a break in the chain of custody or raise serious questions of tampering.

Nor is a break established by the fact that the slide was received in the police department property room on January 9, 2003, but not electronically entered into the computer log until January 11, 2003. Lieutenant John Feeney, the police property clerk, explained at trial that the slide was received and stored in the property room from January 9, 2003 until Criminalist Gabriel collected it in June 2003. The slide's receipt was not immediately entered into the computer log because a new case number had to be assigned before the computer would accept the entry (old case numbers were eight digits and the current computer system requires a nine digit case number). It is not true, as defendant asserts on appeal, that "Officer John Feeney could not say where the slide was kept between January 9, 2003 and January 11, 2003." A paper receipt shows that the slide was received in the police property room on January 9, 2003. The slide was simply not entered into the computer log until the new number was assigned. Even without a current case number, Officer Feeney was clear that "[t]he items are taken in still, regardless of the case number. We can always figure out the numbers later. But the items are taken in, booked in, and put into its [*sic*] location. [¶] And in this case it was booked into the freezer."

The prosecution established an adequate chain of custody sufficient to show a reasonable certainty that there was no alteration in the evidence. Trial counsel's performance was not deficient. An objection to the rectal slide asserting an inadequate chain of custody would have been futile.

E. The prosecution acted properly in testing biological material

Defendant next contends that the prosecution violated his right to due process when testing the biological material on the rectal slide because, in the course of conducting the DNA test, the material on the slide was fully consumed and defendant was thus prevented from conducting his own tests of the slide. It should be noted that the DNA extracted from the slide remains available for retesting but the cells on the slide were consumed and thus the original biological material on the slide is what cannot be reexamined. The record shows that the prosecution did not preserve the slide material because a reliable DNA test could not be conducted without consuming the small amount of material on the slide. We therefore conclude that the prosecution's actions were in good faith and consistent with due process.

"Law enforcement agencies have a duty, under the due process clause of the Fourteenth Amendment, to preserve evidence 'that might be expected to play a significant role in the suspect's defense.' [Citations.] To fall within the scope of this duty, the evidence 'must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.' [Citations.] The state's responsibility is further limited when the defendant's challenge is to 'the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant.' [Citation.] In such case, 'unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.' " (*People v. Roybal* (1998) 19 Cal.4th 481, 509-510.)

"When a piece of evidence in the possession of the prosecution is destroyed because the prosecution finds it necessary to consume the evidence in order to test it, there is no due process violation. The prosecution must be allowed to investigate and prosecute crime, and due process does not require that it forego investigation in order to avoid destroying potentially exculpatory evidence." (*People v. Griffin* (1988) 46 Cal.3d 1011, 1021.) A good faith loss of evidence that is a necessary consequence of the scientific

method used to test the evidence does not violate due process. (*Ibid.*) This principle applies to DNA testing. (*People v. Houston* (2005) 130 Cal.App.4th 279, 302-304.)

Here, DNA testing could not be conducted without consuming the sample. Criminalist Gabriel testified that his laboratory tries to retain some of the original sample for retesting when possible but "if consumption needs to occur in order to obtain a suitable DNA profile, we consume the sample." Consumption was necessary here. Gabriel explained that there was an "extremely limited amount" of starting material: "This sample was a slide that was prepared at the Medical Examiner's Office, and it was a small amount of material, 1-by-3 inch, roughly, slide that has sperm cells and non-sperm cells deposited on it, so there's not much material in that sample." The entire sperm fraction of the rectal slide produced less than seven nanograms of DNA material, and the slide was almost 30 years old. Gabriel testified that he was "really concerned" that he might not get a proper DNA result given the age and size of the sample, and thus needed to consume the entire slide material to obtain a reliable result.

Despite this evidence, defendant questions Gabriel's good faith in consuming the sample during DNA testing. Defendant argues that laboratory policy required Gabriel to confer with a supervisor before consuming a sample, and that Gabriel violated that policy. The laboratory manual states that "[i]f the entire sample must be consumed in order to obtain interpretable results, then the criminalist confers with the technical leader." But Gabriel testified, without contradiction, that he did confer with the technical leader concerning the consumption of samples in old cases, where sampling material was limited, and they established a blanket policy permitting consumption of the sample without need for individual conferences each time the situation arose. Gabriel testified that "Dr. Holt and I had a series of conversations when we began testing in these decades-old unsolved cases, and the general summary of the conversation was that if we needed to consume the sample to obtain a DNA profile, that would be done. [¶] And I would also mention that the slides in these cases generally contained far less material than what is typically submitted to the laboratory. So the policy of the laboratory at the time, and as it stands today, is we will take as much sample as we need to, to get a DNA result."

Defendant also asserts that Gabriel did not act in good faith because Gabriel saw that the sample showed indications inconsistent with being a rectal slide and thus should have submitted the slide to others for confirmation or preserved the slide as exculpatory evidence. Defendant misconstrues Gabriel's testimony about his observations. Gabriel testified that his microscopic examination of the slide found sperm cells and epithelial (skin) cells, as expected. Gabriel's laboratory notes did indicate something "atypical," and this has become the focus of defendant's concern. Gabriel wrote: "There appears to be more stratified, diffusely-strained material (tissue-like) on the rectal smear slide. This appearance is atypical of most rectal smear slides." Gabriel testified that the atypical material looked "striated" and "almost tissue-like" rather than defined "single nucleated epithelial cells by themselves" that he was "typically used to seeing on a rectal slide." But Gabriel insisted that the atypical appearance of the slide was not "necessarily peculiar or interesting; it was just an observation." Gabriel explained that "[t]here's many things that can happen to a body, such as decomposition, rectal trauma, that might cause this . . . occurrence to happen" and thus thought the atypical appearance of the slide could "be completely insignificant." Gabriel could not preserve the atypical material because he needed to scrape off all the material from the slide to conduct the DNA test. Gabriel proceeded with the DNA testing on the supposition that, "[i]f there were any unexpected results, say contamination, that would raise itself at the DNA analysis; and in this sample, there was no contamination." Gabriel acted in good faith. The loss of the biological material on the rectal slide was a necessary consequence of a good faith, investigative DNA test and did not violate due process.

F. The DNA evidence was properly admitted

At defendant's request, the court conducted a pretrial hearing on the admissibility of Criminalist Gabriel's testimony concerning the DNA test results, which matched the spermatozoa on the rectal slide taken from the victim's autopsy with defendant's genetic profile. (*People v. Kelly, supra,* 17 Cal.3d at p. 30.) *Kelly* sets out the required standards in California for admission of expert testimony based upon the application of a new scientific technique: (1) "the reliability of the method must be established, usually by

expert testimony," (2) "the witness furnishing such testimony must be properly qualified as an expert to give an opinion on the subject," and (3) "the proponent of the evidence must demonstrate that correct scientific procedures were used in the particular case." (*Ibid.*, italics omitted.) The trial court found that the DNA test met these standards and admitted Gabriel's testimony. On appeal, defendant concedes that the first two *Kelly* requirements were met—Gabriel tested the DNA samples using a well-established methodology (polymerase chain reaction), and Gabriel is qualified as an expert in the field. Defendant focuses on the third *Kelly* requirement and argues that Gabriel failed to conduct the DNA analysis in a manner consistent with scientific protocols.

"The issue of the inquiry" concerning the third requirement in *Kelly*, *supra*, 17 Cal.3d 24 "is whether the procedures utilized in the case at hand complied" with scientific technique. "Proof of that compliance . . . require[s] that the testifying expert understand the technique and its underlying theory, and be thoroughly familiar with the procedures that were in fact used in the case at bar to implement the technique." (*People v. Venegas* (1998) 18 Cal.4th 47, 81.) Substantial evidence supports the trial court's conclusion that Criminalist Gabriel understood DNA testing and properly tested the DNA samples at issue here.

Gabriel testified that he followed a procedure "that crime labs across the country use," and described the methodology he followed in precise detail. Gabriel used chemical kits, equipment, and procedures routinely used by the Federal Bureau of Investigation (FBI) and crime laboratories for analyzing DNA and applied quality controls to obtain a reliable result. Gabriel testified: "Each step in the DNA analysis process, from extraction through amplification and DNA typing, we have built-in controls that are quality control checks, so that when we make a final determination of the DNA types of the unknown samples, we feel confident that everything was done appropriately." Gabriel noted that his laboratory has established "DNA unit protocols and procedures" based on information from the scientific "community, the FBI endorsement, manufacturers' guidelines as well as internal testing" in the laboratory. Gabriel testified that he followed "the normal practice and procedure in the scientific community" when testing the DNA samples,

"complied with the protocol," and "used the laboratory safeguards in place so I knew I could adequately ensure the accuracy and reproducibility of the sample."

Defendant selects isolated pieces of Gabriel's testimony on cross-examination to dispute Gabriel's compliance with scientific procedures. Defendant notes, for example, that Gabriel acknowledged that "there are times when we must accommodate and make modifications" of the general laboratory protocols set out in a manual. Defendant seizes upon this and similar testimony to argue that Gabriel failed to follow correct scientific procedures. The argument overlooks the fact that correct scientific procedures, including DNA testing, commonly demand some amount of adaptation of general principles during application to differing samples. Gabriel explained this point at the hearing. Gabriel noted that the biological sample contained on the rectal slide in this case was "a challenging sample" because it was almost 30 years old. Gabriel therefore adapted standard laboratory protocols (for example, by doubling the usual incubation period) to obtain a reliable DNA test result: "I want[ed] to make sure that I could get the best possible results, so I actually went beyond what the protocol would suggest and incubated the samples for longer." Gabriel's refusal to slavishly follow general laboratory protocol established for usual DNA samples in favor of more exacting procedures necessary when dealing with more challenging DNA samples does not show a failure to follow correct scientific procedures.

Other portions of Gabriel's testimony highlighted by defendant on appeal likewise fail to show a departure from correct scientific procedures and instead simply reveal instances where Gabriel appears to have become irritated under the stress of a long and grueling cross-examination and became "petulant," as described by the trial court. Defense counsel asked numerous questions about when a criminalist may adapt laboratory protocols in a given case and then stated: "essentially what you are saying is the individual analyst, depending on their level of training and experience, and perhaps their philosophy, could decide to follow parts or not follow parts of these written protocols in the laboratory." Gabriel snapped back: "And maybe based on taste. It may be based on a number of things. Again, yes, the analyst[s], it's at their discretion as to which of the

safeguards they would like to implement, and I did the same thing in the course of this testing." We do not understand Gabriel's facetious retort about departing from protocols "based on taste" to mean that he departed from protocols on a whim when testing the DNA samples in this case. Immediately after his facetious remark, Gabriel clarified that he "used the laboratory safeguards in place so [he] knew [he] could adequately ensure the accuracy and reproducibility of the sample." Reading Gabriel's testimony as a whole, we agree with the trial court in concluding that correct scientific procedures were used to test the DNA samples in this case and the evidence was properly admitted at trial.

III. DISPOSITION

The judgment is affirmed.

_____
Sepulveda, J.

We concur:

_____
Reardon, Acting P.J.

_____
Rivera, J.